

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA GARCIA DE GOMEZ

Claimant

VS.

NATIONAL BEEF PACKING COMPANY

Respondent

AND

ZURICH AMERICAN INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,037,793

ORDER

Claimant appeals the June 11, 2009, Award of Administrative Law Judge Pamela J. Fuller (ALJ). Claimant was awarded a 16 percent permanent partial impairment of the whole person for the injuries to her cervical spine and bilateral upper extremities, based on the medical opinions of board certified orthopedic surgeon Terrence Pratt M.D., and board certified orthopedic surgeon John P. Estivo, D.O.

Claimant appeared by her attorney, Conn Felix Sanchez of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, D. Shane Bangerter of Dodge City, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on October 6, 2009.

ISSUES

1. What is the nature and extent of claimant's injuries and disability? Claimant argues her whole body disability is more accurately identified by board certified physical medicine and rehabilitation specialist Michael H. Munhall, M.D., in allowing additional impairment for the limited range of motion to her shoulders. Therefore, her award should be 24 percent to the whole body.

Respondent argues the opinions of Dr. Pratt and Dr. Estivo more accurately delineate claimant's impairment, and the award of the ALJ granting claimant a 16 percent permanent partial impairment to the body as a whole, excluding any impairment for the shoulders, should be affirmed. There is no claim for a permanent partial general disability as claimant was still employed by respondent at the time of the regular hearing.

2. What was claimant's average weekly wage on the date of accident? Respondent alleged at the regular hearing that claimant's average weekly wage should be \$525.74. However, before the Board, respondent argued that the \$483.14 weekly wage determined by the ALJ in the Award should be affirmed. Claimant argued to the Board for an average weekly wage of \$527.90.

FINDINGS OF FACT

Claimant had worked for respondent as a laborer since 2005, handling an air knife. Claimant began developing problems with her neck, shoulders, arms, hands and fingers. The parties have agreed to an accident date in this matter of January 12, 2007. Claimant was initially referred to Dr. Chan, who diagnosed claimant with neck pain, possible carpal tunnel syndrome and pain in both shoulders, consistent with impingement syndrome. Claimant's shoulders were injected in Dr. Chan's office on July 27, 2007. The injections provided some improvement, but claimant's neck pain remained. Dr. Chan then referred claimant to Dr. Estivo. Dr. Estivo first examined claimant on October 3, 2007. At that time, claimant had pain in her neck, both upper extremities and her upper back. Dr. Estivo noted that the injections in claimant's shoulders had provided some improvement in claimant's pain, but the neck pain remained. NCT/EMG tests of claimant's upper extremities indicated mild bilateral carpal tunnel syndrome. A physical examination displayed right shoulder pain with forward flexion of the right humerus with internal rotation in adduction. Claimant's left shoulder displayed tenderness throughout the range of motion examination. Claimant was diagnosed with cervical spine strain and bilateral carpal tunnel syndrome. An MRI of the cervical spine, performed on October 10, 2007, indicated mild reversal of the normal cervical curve indicating some component of underlying muscle spasm, with no evidence of disc bulge or protrusion.

Claimant was next examined on October 22, 2007. At that time, claimant continued to experience cervical spine pain and symptoms of bilateral carpal tunnel syndrome. However, claimant's shoulders displayed a full range of motion both actively and passively, without discomfort. At the next examination on November 5, 2007, claimant continued to

display symptoms of bilateral carpal tunnel syndrome and cervical spine strain, but claimant's shoulders continued to exhibit a full range of motion.

The examination on December 3, 2007, noted continued carpal tunnel syndrome, bilaterally, and cervical spine strain. The range of motion in claimant's shoulders remained full both actively and passively. Claimant's right carpal tunnel was injected on November 5, 2007, with little benefit. A right carpal tunnel release was discussed, with claimant being willing to proceed. Surgery was performed on January 3, 2008, with claimant returning to Dr. Estivo on January 10, 2008. Claimant continued to experience left hand carpal tunnel symptoms and tenderness in the cervical spine with range of motion. The right shoulder was taken through a range of motion test without discomfort. The left shoulder was not discussed in the January 10, 2008, note. Possible left carpal tunnel surgery was discussed.

At the time of the January 18, 2008, examination, claimant displayed a bit of tingling in her right hand, but overall she was improved. Tingling and numbness remained in the left hand, and cervical spine discomfort remained. Claimant's right shoulder remained non-tender, with the left shoulder again not being mentioned. Physical therapy for the right hand and cervical spine was recommended.

On February 22, 2008, claimant discussed right hand weakness, but indicated steady progress with the right hand. The numbness and tingling in the left hand remained. The cervical spine remained tender with range of motion testing. The right shoulder is not mentioned, however, the left shoulder was described as non-tender.

During the March 14, 2008, examination, claimant advised Dr. Estivo that she did not want the left hand carpal tunnel surgery as her left hand was not bothering her enough to consider surgery. Claimant was still experiencing cervical spine discomfort. The range of motion of claimant's shoulders was measured with the aid of a goniometer, and the range of motion was normal, with no instability found in either shoulder. Dr. Estivo determined that claimant had reached maximum medical improvement (MMI) and rated her pursuant to the fourth edition of the *AMA Guides*¹ at a 5 percent whole person impairment for the cervical spine strain and 10 percent to each upper extremity for the carpal tunnel syndrome, which equates to a 6 percent whole body rating. Using the combined values chart, this totals to a 16 percent whole person impairment. Claimant was returned to work with a permanent restriction of only limited overhead work due to the problems with her cervical spine.

Claimant was referred by her attorney to Dr. Munhall for an examination on June 9, 2008. Claimant's complaints to Dr. Munhall were to her neck and bilateral arms. Claimant

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

described constant cervical spine pain with no significant improvement from physical therapy. Claimant also complained of constant bilateral shoulder aching and numbness in the entire right arm after the carpal tunnel surgery. Claimant also had intermittent left arm numbness over the entire arm, and bilateral loss of hand coordination and night awakening, as well as hand cramping in the left hand. Claimant's cervical spine range of motion was limited, with pain. The range of motion was limited in both shoulders, with an active evaluation. A passive evaluation was not performed.

Claimant displayed a positive Phalen's bilaterally and her left wrist displayed a positive Tinel's. Dr. Munhall found claimant to be at MMI with bilateral shoulder pain, bilateral carpal tunnel syndrome and cervical derangement syndrome. Dr. Munhall opined that all of claimant's ongoing physical problems were the result of her employment with respondent through January 12, 2007. In a separate report of June 17, 2008, Dr. Munhall rated claimant at a 5 percent whole person impairment for the cervical spine derangement, 9 percent and 8 percent respectively to the right and left upper extremities for the shoulder range of motion limitations and 10 percent to each upper extremity for the bilateral carpal tunnel, all of which combine for a 24 percent whole person permanent partial impairment of function.

Due to the conflict in medical opinions, the ALJ referred claimant to Dr. Pratt for an independent medical evaluation (IME) on November 4, 2008. Claimant complained of cervical pain radiating into the mid back, behind both ears and to both elbows. Her shoulders were reported as having a heavy sensation with exacerbation with range of motion. During the examination of claimant's upper extremity motor abilities, claimant displayed generalized giveaway bilaterally. Claimant displayed palpable tenderness bilaterally with light touch, more significantly in the shoulder area. Claimant did display bilateral Tinel's for the median nerves at the wrist and the ulnar nerves at the elbow level. Claimant also complained of bilateral cramping. Claimant's cervical examination was limited with an active range of motion evaluation. Dr. Pratt diagnosed claimant with cervical-thoracic syndrome and bilateral carpal tunnel syndrome, by history. Pursuant to the fourth edition of the *AMA Guides*², claimant was assessed a 5 percent impairment of the whole person for her cervicothoracic involvement and a 10 percent to each upper extremity for the bilateral carpal tunnel syndrome, which combine for a 16 percent permanent partial impairment of the whole person. Dr. Pratt determined that claimant had no impairment for her shoulder complaints due to the generalized giveaway weakness displayed during the examination, along with inconsistencies during pinch and grip strength testing. Additionally, the sensory loss displayed did not follow a specific dermatomal distribution. Dr. Pratt did not consider these findings to be a true indication of claimant's functional abilities.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

The parties dispute the average weekly wage as determined by the ALJ. The wage statement³ displays an hourly wage of \$11.85 during the week of claimant's accidental injury. The wage statement only displays 25 weeks of wages, including the week of the accident and one week during which claimant was on vacation. The total gross regular time wages total \$10,301.76. The ALJ, in calculating claimant's average weekly wage, took the total gross wages and divided the amount by 24, excluding either the week of the accident, or the week claimant was on vacation. The award does not specify which was excluded or why. The ALJ also divided \$1,293.53 in overtime by 24 weeks, resulting in an average weekly wage of \$483.14. Claimant disagrees with the wage calculations of the ALJ. Respondent argued for an average weekly wage of \$525.74 at the time of the regular hearing, but argued to the Board that the wage as calculated by the ALJ in the award should be adopted.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2006 Supp. 44-511(a)(5) states:

The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

K.S.A. 2006 Supp. 44-511(b)(4) states:

If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the

³ R.H. Trans., Ex. 1.

minimum hours for computing the wage of a full-time hourly employee, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

The wage statement consists of a printout of the wages and overtime paid to claimant for the 25 weeks preceding the accident. Claimant was considered to be a full-time employee. Under K.S.A. 2006 Supp. 44-511, claimant, as a full-time employee, being paid by the hour, is deemed to have worked 40 hours per week at a minimum, unless her customary workweek was shown to be different. Here, the 40-hour week was the customary work period. With an hourly wage of \$11.85 on the date of accident, this calculates to \$474.00 per week straight time. Additionally, claimant had earned overtime pay in the amount of \$1,293.53. The time sheet contains 25 weeks of wage records. However, one week of the 25 consists of vacation time. The Kansas Supreme Court, in *Elder*,⁴ determined that weeks during which a claimant is on vacation shall not be counted in determining a worker's average weekly wage. Here, claimant was on vacation for one of the 25 weeks. Therefore, the Board will utilize 24 weeks as the dividing factor in calculating the amount of overtime earned on the average each week. Dividing \$1,293.53 by 24 calculates to \$53.90 per week. This, when added to the weekly straight time wage calculated above, calculates to an average weekly wage of \$527.90. The award of the ALJ is modified accordingly.

K.S.A. 44-510e defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁵

The Board finds the functional ratings of Dr. Pratt and Dr. Estivo to be the most persuasive. Dr. Estivo examined and treated claimant for several months with little

⁴ *Elder v. Arma Mobile Transit Co.*, 253 Kan. 824, 861 P.2d 822 (1993).

⁵ K.S.A. 44-510e(a).

shoulder involvement. Claimant's range of motion in her shoulders was normal during almost every examination except one of the early examinations. The range of motion problems found in claimant's shoulders by Dr. Pratt were determined to be suspect due to the inconsistencies encountered during his examination of claimant. The consistent findings of Dr. Pratt, the court-ordered IME physician, and Dr. Estivo, the treating physician, carry more weight than the determination by claimant's expert, Dr. Munhall. The Board adopts the findings of the ALJ that claimant suffered a 16 percent permanent partial impairment of the whole person.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find claimant had an average weekly wage of \$527.90 on the date of accident, but affirmed in all other regards. Claimant has a 16 percent permanent partial whole body disability as the result of the injuries suffered through January 12, 2007.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 11, 2009, should be, and is hereby, modified to find that claimant had an average weekly wage of \$527.90 on the date of accident but otherwise affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Maria Garcia de Gomez, and against the respondent, National Beef Packing Company, and its insurance carrier, Zurich American Insurance Company, for an accidental injury which occurred through January 12, 2007, and based upon an average weekly wage of \$527.90, for 66.40 weeks permanent partial disability at the rate of \$351.95 per week or \$23,369.48, for a 16 percent permanent partial whole body disability.

As of the date of this Order, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts already paid.

IT IS SO ORDERED.

Dated this ____ day of October, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge